

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

74-2181

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

-against-

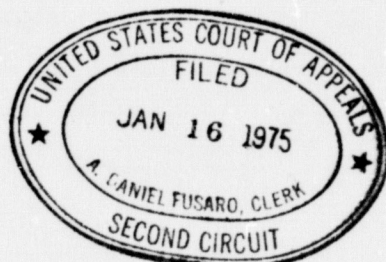
EUGENIO FARINAS,

Appellant.

BPS
Docket No. 74-2181

BRIEF FOR APPELLANT
PURSUANT TO ANDERS v. CALIFORNIA

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK



WILLIAM J. GALLAGHER, ESQ.,
THE LEGAL AID SOCIETY,
Attorney for Appellant
FEDERAL DEFENDER SERVICES UNIT
509 United States Court House
Foley Square
New York, New York 10007
(212) 732-2971

SHEILA GINSBERG,
Of Counsel

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QUESTION PRESENTED

Whether there are any non-frivolous issues which can be
presented for this Court's review.

STATEMENT PURSUANT TO RULE 28(3)

Preliminary Statement

This is an appeal from a judgment of the United States District Court for the Southern District of New York (The Honorable Edward Weinfeld) rendered August 22, 1974, after a non-jury trial, convicting appellant of three counts of conspiracy to kidnap (18 U.S.C. §1201(c)), kidnapping (18 U.S.C. §1201(a)), and telephoning a threat to injure another (18 U.S.C. §875(c)). Appellant was sentenced to a three-year term of imprisonment on each count, the terms to be served concurrently.

This Court granted leave to appeal in forma pauperis, and The Legal Aid Society, Federal Defender Services Unit, was appointed to represent appellant on appeal, pursuant to the Criminal Justice Act.

Statement of Facts

At the start of the trial, on advice of counsel and after an extensive inquiry by the Judge as to appellant's comprehension of his Sixth Amendment right to a trial by jury, appellant waived that right and agreed to a trial by Judge Weinfeld alone (4-8*).

*Numerals in parentheses refer to pages of the transcript of the trial.

The Government's case consisted of the testimony of Orlando Lopez, the victim of the kidnapping (15-38); his wife, Teresa Lopez (38-63); Sylvia Pelliccio Francisca, his sister-in-law (63-71); Ramon Villegas (72-124); Irene Gonzales (124-153), and Rosa Ramirez (153-189), three participants in the kidnapping; and Edward J. Doherty (189-194), Margo Dennedy (194-199), Michael Hayes (199-203), and Robert M. Straub (203-208), all officers of the Federal Bureau of Investigation.

Ramon Villegas, who pleaded guilty (119) to participating in the kidnapping, testified that on June 1, 1974, he, Ernestor Iglesias,* and appellant met at the home of Lydia Ramirez,** and the three discussed the fact that Orlando Lopez owed Villegas \$6,000 in payment for a bet on a winning number, and that the only way to collect the money was to "take" Lopez and demand the \$6,000 plus extra money in exchange for releasing him. According to Villegas, the three agreed that any one of them who had the opportunity should follow Lopez (75-76).

On the morning of June 11, 1974, Villegas was contacted at his home by telephone by Irene Gonzalez, who informed Villegas

*Iglesias, who was indicted with appellant, was a fugitive at the time of trial.

**Also present during the conversation were Irene Gonzalez and a man known as "Charlie;" Lydia and Rosa Ramirez were in another room watching television (76). During the course of their testimony, both Irene Gonzalez and Rosa Ramirez testified to appellant's presence in the Ramirez apartment at the time of the June 1, 1974, meeting (126-130, 155-156).

that she and Ernestor Iglesias had caught Lopez in New Jersey* and were bringing him back to New York (78). There followed Villegas' meeting** with Iglesias, Gonzales, and the victim on Amsterdam Avenue, where they were waiting for him; the trip back to the Riviera Motel in Fort Lee, New Jersey, where Lopez was held captive; and the telephone calls and demands for \$30,000 to Teresa Lopez at her sister's house in Spring Valley; the aborted attempt the following day to pick up the ransom on Dyckman Road;*** and the final arrangement to meet Teresa Lopez and get the money in New Jersey on Routes 1 and 9 (80-94; 89-91; 93).

According to Villegas' testimony, appellant played no part in the kidnapping or ransom demands**** until the morning of

*Both Orlando Lopez and Irene Gonzales testified that Gonzales and Iglesias had forced Orlando into their car at gunpoint and that during the course of the ride to Manhattan Lopez and Iglesias struggled, and the car hit an asphalt abutment and was rendered inoperable (17-19; 131-137). The trio waited on Amsterdam Avenue to be picked up by Villegas.

**Villegas was accompanied by one Marcello Diaz, who he claimed was not involved in the plot.

***FBI Agent Edward Doherty testified to his surveillance of the Dyckman Road area and of his observation of a car which fit the description given by Villegas (191-193).

****Rosa Ramirez testified that some time on June 11, 1974, appellant telephoned her sister Lydia's apartment and she told him of the kidnapping activities as described by Ramirez. Appellant subsequently arrived at the apartment to wait for Villegas, but after waiting two hours, he left (158).

June 12, when appellant met Villegas at the Ramirez apartment. Appellant insisted, according to Villegas, on going with him to meet Mrs. Lopez (95). During the ride to New Jersey, Villegas repeated the facts of the kidnapping to appellant, and the two discussed the ransom split, agreeing that Villegas would get \$5,000, appellant \$6,000, and Iglesias the remainder (97). Appellant allegedly told Villegas he would use his \$5,000 to go to Florida. When Villegas got to Route 1 and 9 in New Jersey, he stopped the car to wait for Mrs. Lopez (98). As her car approached, he identified the vehicle to appellant and then pulled in behind her, caught up to her car, and, by use of hand signals, directed her to follow him (98-99).*

Mrs. Lopez testified that when this car pulled alongside her vehicle, both the man in the passenger seat (identified as appellant) and the driver motioned for her to follow them,** which she did (50). The lead car, followed by Mrs. Lopez, turned left*** off Route 1-9, drove a block, and made another left turn, and then stopped. Appellant motioned for Mrs. Lopez

*FBI Agent Straub testified that on the afternoon of June 12, 1974, he observed Villegas' car parked along the side of Route 1-9 (204).

**Agents Dennedy, Hayes, and Straub each testified that they observed appellant making hand signals to Mrs. Lopez (197, 201, 206).

***Villegas testified that he turned off Route 1-9 because he and appellant feared that some of the other cars they noticed belonged to the FBI (99).

to back up, and Villegas also began to move his car in reverse when he and appellant were arrested by FBI agents Dennedy, Hayes, and Straub.

After a motion for a verdict of not guilty was denied (203-211), the defense presented the testimony of Orlando Lopez (212-217); Feocconi Laurent (221-227); Nelson Garcia (269-279); Joe Saiz (279-286); Herman Ruth (286-291); Maria Sanchez (259-260); and appellant himself (223-259). It was the defense theory that although appellant knew the various participants in the kidnapping, he did not himself participate. Appellant admitted being at the Ramirez apartment some time in early June, but he denied involvement in the agreement to kidnap Lopez (232). He also specifically denied that he learned of the fact of the kidnapping from Rosa Ramirez or that he accompanied Villegas to New Jersey to help him pick up the ransom.

According to appellant, he was in New York on the morning of June 12 to look for the car keys he had lost the night before (235). When he couldn't find the keys, and therefore could not drive himself back to New Jersey (where he lived), he asked Villegas, whom he met on the street, to give him a ride (236). Contrary to Villegas' assertions, appellant specifically denied discussing the kidnapping during the drive, and he further explained that the car pulled to the side of the road not to wait for Mrs. Lopez, but rather so that he and Villegas could smoke some marijuana (236-237). Appellant

also denied making hand signals to Mrs. Lopez* and suggested that perhaps the movements the agents had observed were only hand gestures he used while talking (257).

In further support of the contention that Villegas was lying, Laurent, Garcia, Saiz, and Ruth, all inmates of the Federal Detention Headquarters at West Street, each testified that they had heard Villegas admit that appellant was innocent, but that the Government was nonetheless pressuring Villegas, in exchange for leniency, to testify against appellant.

Judge Weinfeld found,** inter alia:

The evidence establishes beyond a reasonable doubt, indeed, beyond peradventure of doubt, the existence of the conspiracy as charged in the indictment and the commission of the overt acts in its furtherance. In fact, the conspiracy achieved success.

* * *

Thus the case, despite what the Assistant United States Attorney suggested, does turn upon the issue of credibility. As defense counsel put it, was Villegas telling the truth, or is Farinas telling the truth or, more accurately, were the government witnesses telling the truth or was the defendant telling the truth?

I have reflected upon the evidence as it has been submitted and I accept, in substance, the testimony of the government witnesses. Farinas' explanation of his presence in the

*Appellant did concede that after Villegas had turned off Routes 1-9 he did signal the car behind them to back up, but that was because Villegas had made a wrong turn onto a one-way street.

**The Judge's findings are annexed as "C" to the appendix.

car borders on the absurd. The testimony of the inmates of West Street Detention House, each with a variety of convictions of felonies, that Villegas, while an inmate there expressed his opinion that Farinas was innocent, of course, is not only a conclusion, but cannot destroy the basic facts testified to by Villegas as well as other Government witnesses, including Mrs. Lopez and FBI agents who trailed Mrs. Lopez' car -- that is, the one in which Farinas was riding and from which the hand signals were given. The suggestion of a motive for Villegas' testimony and that of Rosa Ramirez is without substance.

Transcript of July 22, 1974,
at 7-8.

POSSIBLE ISSUE ON APPEAL

The only contested issue at trial was one of credibility of witnesses: were Villegas, the other participants in the kidnapping, Mrs. Lopez, and the FBI agents telling the truth, or was appellant. Judge Weinfeld resolved this purely technical issue of credibility in favor of the Government. It is settled that credibility issues are best resolved by the trier of fact and will not be disturbed on appeal. United States v. Suarez, 380 F.2d 713, 716 (2d Cir. 1967); United States v. Arterbridge, 374 F.2d 506 (2d Cir. 1967); United States v. Alvarado, 321 F.2d 336 (2d Cir.), cert. denied, 375 U.S. 987 (1962). Thus, there is no issue which can properly be presented to this Court for its review.

CONCLUSION

For the foregoing reasons, the motion to be relieved as counsel on appeal should be granted.

Respectfully submitted,

WILLIAM J. CALLAGHER, ESQ.,
THE LEGAL AID SOCIETY,
Attorney for Appellant
FEDERAL DEFENDER SERVICES UNIT
509 United States Court House
Foley Square
New York, New York 10007
(212) 732-2971

SHEILA GINSBERG,
Of Counsel

January 16, 1975

Certificate of Service

January 16, 1975

I certify that a copy of this brief and appendix has been mailed to the United States Attorney for the Southern District of New York.

Sheldon G. Broteny

